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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JASON SPAULDING,

Plaintiff and
Respondent,

v.

PJCA-2, LP et al.,

Defendants and
Appellants.

B285996

(Los Angeles County
Super. Ct. No. BC663885)

APPEAL from an order of the Superior Court of
Los Angeles County, Michael L. Stern, Judge. Reversed and
remanded with directions.

Wilson Turner Kosmo, Leonid M. Zilberman and Krystal
N. Weaver for Defendants and Appellants PJCA-2 and Cinthya
Ruiz.

Ogletree, Deakins, Nash, Smoak & Stewart, Betsy Johnson
and Laura E. Heyne for Defendant and Appellant Papa John's
USA, Inc.

O'Connor & O'Connor and Derek J. Angell (*pro hac vice*);
Kramer Holcomb Sheik, John L. Holcomb, Jr. and Daniel K.
Kramer for Plaintiff and Respondent.

PJCA-2, LP, Cinthya Ruiz, and Papa John's USA, Inc.
appeal from an order denying their motion to compel arbitration
of Jason Spaulding's employment-related claims. The trial court
ruled the arbitration agreement was procedurally and
substantively unconscionable and refused to enforce the
agreement. Because the arbitration agreement has some
procedural unconscionability, but is not substantively
unconscionable, and because a court can refuse to enforce an
arbitration agreement as unconscionable only where there is both
procedural and substantive unconscionability, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Spaulding Is Hired, Disciplined, and Fired

Spaulding began working for Papa John's in 2009. For the
next seven years, Spaulding worked at the Glendora store doing a
variety of tasks, including opening and closing the store,
sweeping and mopping, ordering and receiving inventory,
preparing food, handling customer complaints, monitoring
quality control, washing dishes, answering phones, and taking
orders.

In August 2015 PJCA-2, a franchisee of Papa John's USA,
purchased the Glendora store. PJCA-2 continued to employ
Spaulding, but asked him to review and sign a 40-page "New

Hire Package” that included a four-page document titled “Mutual Agreement to Arbitrate Claims.” After taking the packet home and reviewing it overnight, Spaulding signed the arbitration agreement. He expressed his displeasure with the agreement, however, by scribbling his name illegibly on the signature line, crossing out the word “voluntarily,” and writing “UD” on the first page to indicate, according to him, he was signing it under duress.

In January 2016 PJCA-2 promoted Spaulding to shift leader, which made him the most senior manager in the store in the absence of the general manager and responsible for enforcing company policy. The company’s policy included a list of 15 “non-negotiables,” two of which were “Store always opens on time – store never closes early” and “No expired products in the store at any time.”

Several months after his promotion, Spaulding began experiencing work-related problems. On July 14, 2016 Spaulding met with Hector Ortiz, who was the district operator for PJCA-2,¹ Cinthya Ruiz, who was the general manager,² and the human resources director. The four of them discussed various issues concerning Spaulding’s employment, including substandard work performance, difficulty getting along with coworkers, and insubordination.

¹ The district operator provides management support and supervises in-store management and operations.

² The general manager is responsible for scheduling employees, coaching employees, and ensuring compliance with company policies and procedures.

Four days later, Spaulding filed a complaint with the Los Angeles County Health Department, alleging PJCA-2 was using expired ingredients and relabeling packages of expired ingredients to conceal expiration dates.³ Two days after that, Spaulding had a five-hour meeting with Ortiz, Ruiz, Monte Woodward, who was the new district operator, and another officer of the company. At the meeting Spaulding claimed Ruiz told him on multiple occasions, in person and by text message, to use expired food products and change dates on labels. Spaulding said he complied with Ruiz's directions because he was afraid he would lose his job if he did not comply.⁴ Although Woodward did not believe the text messages supported Spaulding's claim, PJCA-2 determined that both Spaulding and Ruiz violated company policy, and both of them received written corrective actions directing them not to use expired food products or change the dates on expired food.

On August 15, 2016 Spaulding met with Woodward to discuss reports that Spaulding had used expired ingredients to make himself a pizza. On August 30, 2016 PJCA-2 suspended Spaulding for offering expired brownies to employees.

On September 6, 2016 PJCA-2 fired Spaulding for violating company policy. PJCA-2 stated it was terminating Spaulding's employment because he threw away food that had not expired, prepared excess food resulting in its spoiling, failed to follow the company's procedures for expired food, ate store food without

³ After Spaulding's complaint, the Los Angeles County Health Department conducted a surprise inspection of the restaurant and gave it a score of 95 and a rating of "A."

⁴ Spaulding also accused Ruiz of mislabeling the expiration date on a dessert product, but he later recanted this claim.

paying for it, failed to close the store in a timely manner, had poor time management and work prioritization skills, had difficulty getting along with coworkers, and was insubordinate.

B. *Spaulding Sues, and the Defendants Move To Compel Arbitration*

On June 6, 2017 Spaulding filed this action against PJCA-2, Ruiz, and Papa John's USA, Inc., alleging 18 employment-related causes of action, including disability discrimination based on Spaulding's epilepsy and seizures, harassment, failure to provide reasonable accommodations, retaliation, intentional and negligent infliction of emotional distress, and numerous Labor Code violations. Spaulding named PJCA-2 and Papa John's as defendants in all 18 causes of action and Ruiz in the causes of action for disability discrimination and harassment.

PJCA-2 and Ruiz moved to compel arbitration.⁵ They argued that Spaulding agreed to arbitrate all his claims, that Ruiz and Papa John's could enforce the agreement as non-signatories, and that the agreement was not unconscionable. Papa John's filed a joinder, arguing that it could enforce the arbitration agreement as an agent or third party beneficiary and that Spaulding was equitably estopped from arguing Papa John's could not enforce the agreement. In opposition, Spaulding argued the trial court should not enforce the arbitration

⁵ Meanwhile, Spaulding filed a motion for a preliminary injunction seeking to enjoin PJCA-2 and Papa John's from using expired ingredients and using the slogan "Better Ingredients. Better Pizza." After PJCA-2 and Ruiz moved to compel arbitration, Spaulding took his motion off calendar.

agreement because it was procedurally and substantively unconscionable.

The trial court denied the motion to compel arbitration. The court ruled: “First, the Court found the Agreement procedurally unconscionable because [Spaulding] felt strong pressure to sign the Agreement; [Spaulding] tried to indicate that the Agreement was signed under duress (i.e., instead of providing his actual signature on page four he just scribbled something on the signature line, he crossed out the word ‘VOLUNTARY’ [*sic*] on page three, and wrote ‘UD’ on the first page signifying ‘under duress’); [Spaulding] was told that he had to sign the Agreement to continue working for PJCA-2; [Spaulding] was unable to negotiate the terms of the Agreement; a representative of PJCA-2 did not make himself/herself available to answer questions about the Agreement; and the rules of the American Arbitration Association (‘AAA’), which were referenced in the Agreement, were not attached to the Agreement or otherwise provided to [Spaulding]. Second, the Court found the Agreement substantively unconscionable because it restricted [Spaulding’s] right to discovery because AAA Rule 9 empowers the arbitrator to limit discovery based on the arbitrator’s discretion consistent with the expedited nature of discovery.” PJCA-2, Ruiz, and Papa John’s timely appealed.

DISCUSSION

A. *Standard of Review*

““““There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court’s order is based on a decision of fact, then we adopt a

substantial evidence standard. [Citations.] Alternatively, if the court’s denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]” [Citation.] The issue of whether a third party is bound by an arbitration agreement is a question of law.” (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 839-840; accord, *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 415; *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2015) 234 Cal.App.4th 459, 467.)

Here, although the trial court made certain factual findings in ruling on the motion to compel arbitration, there are no material conflicts in the evidence. Rather, the parties disagree over whether, in light of the facts, the arbitration agreement is unconscionable. In these circumstances, the issue is a question of law that we review de novo. (See *The McCaffrey Group, Inc. v. Superior Court* (2014) 224 Cal.App.4th 1330, 1347 [“[i]f there are no material conflicts in the evidence bearing on the issue of unconscionability, our review is de novo”].)⁶

B. *The Trial Court Erred in Not Enforcing the Arbitration Agreement*

A court may refuse to enforce an unconscionable arbitration agreement. (Civ. Code, § 1670.5, subd. (a); see *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 83 [“[i]f a court finds as a matter of law that a contract or any clause of a contract is unconscionable, the court may refuse to enforce

⁶ Spalding concedes that if PJCA-2 can enforce the arbitration agreement so can Ruiz and Papa John’s, that the arbitration agreement applies to all of Spaulding’s claims, and that the Federal Arbitration Act applies.

the contract or clause,” and “[a]n agreement to arbitrate, like any other contract, is subject to revocation if the agreement is unconscionable”].) “[U]nconscionability has both a “procedural” and a “substantive” element,’ the former focusing on “oppression” or “surprise” due to unequal bargaining power, the latter on “overly harsh” or “one-sided” results.” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*).) ““The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.” [Citation.] But they need not be present in the same degree. “Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.” [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243-1244; see *Baxter v. Genworth North America Corp.* (2017) 16 Cal.App.5th 713, 723 [“a court may not refuse to enforce an arbitration agreement unless it is *both* procedurally and substantively unconscionable”]; *De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 982 [“[s]ome measure of both procedural and substantive unconscionability must be present—although given the sliding-scale nature of the doctrine, more of one kind mitigates how much of the other kind is needed”]; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 178 [“[b]oth procedural and substantive

unconscionability must be present before a contract or term will be deemed unconscionable”].)

1. *The Arbitration Agreement Has Some Procedural Unconscionability*

PJCA-2 and Ruiz argue the trial court erred in ruling the arbitration agreement is procedurally unconscionable. The arbitration agreement, however, does have some procedural unconscionability.

The trial court found the arbitration agreement was procedurally unconscionable because the company did not make someone available to answer questions Spaulding may have had about the arbitration agreement. Not only was there no evidence Spaulding had any such questions, the company’s failure to provide someone to answer questions does not support a finding of procedural unconscionability. “No law requires that parties dealing at arm’s length have a duty to explain to each other the terms of a written contract, particularly where, as here, the language of the contract expressly and plainly provides for the arbitration of disputes arising out of the contractual relationship.” (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1674; accord, *Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 686; see *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 914 [automobile seller “was under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to [the buyer’s] attention”].)

The trial court also found the arbitration agreement’s failure to attach the rules of the AAA that would govern arbitration of Spaulding’s employment claims, the AAA

Employment Arbitration Rules and Mediation Procedures, made the arbitration agreement procedurally unconscionable. But failure to attach a copy of the AAA rules to an arbitration agreement providing for AAA arbitration does not “render the agreement procedurally unconscionable,” particularly where, as here, “the arbitration rules referenced in the agreement were easily accessible to the parties [and] are available on the Internet.” (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 691; see *Baltazar v. Forever 21, Inc.*, *supra*, 62 Cal.4th at p. 1246 [failure to provide an employee with the AAA rules did not make arbitration agreement procedurally unconscionable]; *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1472 [“failure to attach the AAA rules, standing alone, is insufficient grounds to support a finding of procedural unconscionability”]; *Bigler v. Harker School* (2013) 213 Cal.App.4th 727, 737 [“the absence of the AAA rules is of minor significance to [the procedural unconscionability] analysis”]; see also *Boghos v. Certain Underwriters at Lloyd’s of London* (2005) 36 Cal.4th 495, 506, fn. 6 [“[t]he full, up-to-date text of [the AAA commercial arbitration] rules is available on the AAA’s Internet site”]; *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 240 [AAA Employment Arbitration Rules and Mediation Procedures are subject to judicial notice].)

The only aspect of the arbitration agreement the court properly found was procedurally unconscionable was that PJCA-2 presented the arbitration agreement on a take-it-or-leave-it basis, i.e., Spaulding was unable to negotiate its terms and had to sign it as a condition of continuing his employment. As the Supreme Court stated in *Baltazar v. Forever 21, Inc.*, *supra*, 62 Cal.4th 1237, we “must be ‘particularly attuned’ to this danger in the

employment setting, where ‘economic pressure exerted by employers on all but the most sought-after employees may be particularly acute.’” (*Id.* at p. 1244.) Thus, where an employer requires an employee who lacks equal bargaining power to accept or continue employment on the condition the employee sign an agreement containing an arbitration provision on a “take-it-or-leave-it basis,” there is some procedural unconscionability. (See *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796 [“[t]he finding that the arbitration provision was part of a nonnegotiated employment agreement establishes, by itself, some degree of procedural unconscionability”]; see also *Baxter v Genworth North America Corp., supra*, 16 Cal.App.5th at p. 723 [lack of equal bargaining power supports a finding of procedural unconscionability].) Therefore, there is some procedural unconscionability in the arbitration agreement.

2. *The Arbitration Agreement Is Not Substantively Unconscionable*

The trial court found the arbitration agreement was substantively unconscionable because it gave the arbitrator discretion to limit discovery. The trial court cited language in the agreement stating: “The Arbitrator shall permit each party to conduct adequate discovery (including document discovery and depositions), according to the needs of the case and the Arbitrator’s discretion.” The trial court also cited the provision in the agreement that “the arbitration will be held in accordance with the then current Employment Arbitration Rules and Procedures . . . of the American Arbitration Association.” Rule 9 of those rules in turn provides that “[t]he arbitrator shall have the authority to order such discovery, by way of deposition,

interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.”

These provisions did not make the arbitration agreement substantively unconscionable. As Spaulding appropriately concedes: “We acknowledge at the outset that the trial court’s reliance on AAA Rule 9, providing the arbitrator with discretion in discovery, is insufficient on its own to create substantive unconscionability.” In *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462 this court reviewed similar AAA rules governing discovery and concluded “the AAA’s employment dispute rules applicable to [the employee’s] arbitration proceeding expressly authorized the arbitrator to order ‘such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.’ There appears to be no meaningful difference between the scope of discovery approved in *Armendariz* and that authorized by the AAA employment dispute rules, certainly not the role of the arbitrator in controlling the extent of actual discovery permitted.” (*Id.* at p. 1476; see also *Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, 438 [“California law permits parties to arbitrate under the American Arbitration Association’s employment dispute resolution rules,” which “give arbitrators broad authority to decide how much discovery is appropriate, ‘consistent with the expedited nature of arbitration’”].) For this reason, the trial court erred in ruling that the AAA rules governing discovery made the arbitration agreement substantively unconscionable.

Because the arbitration agreement had no substantive unconscionability, the trial court erred in refusing to enforce the arbitration agreement as unconscionable. (See *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 702-703 [both procedural and substantive unconscionability “must appear for a court to invalidate” an arbitration agreement]; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1159-1160 [arbitration agreement was enforceable where, even if it was procedurally unconscionable, it was not substantively unconscionable].)

C. *Spaulding Forfeited His New Arguments Regarding Substantive Unconscionability*

Conceding the trial court’s sole reason for finding the arbitration agreement was substantively unconscionable was insufficient, and having had “a perhaps more adequate opportunity to peruse the 50-page rules” of the AAA, Spaulding makes substantive unconscionability arguments on appeal that he did not make in the trial court. His new arguments are (1) the arbitrator could award arbitration expenses against Spaulding if the arbitrator finds the employment agreement was individually negotiated,⁷ (2) the arbitration agreement includes a

⁷ For purposes of costs, the 2016 AAA Employment Arbitration Rules and Mediation Procedures distinguished between employer plans and individually negotiated employment agreements. In an employer plan, the “arbitration program and/or agreement between the individual employee and the employer is one in which it appears that the employer has drafted a standardized arbitration clause with its employees.” In an individually negotiated employment agreement, the parties had an ability to “to negotiate the terms and conditions of the

confidentiality provision,⁸ (3) the arbitrator has discretion to exclude witnesses from the arbitration hearings, and (4) the repeat-player effect, where “an employer repeatedly appears before the same group of arbitrators” (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 178), gives large institutions like Papa John’s an unfair advantage in arbitration. Spaulding also argues, again for the first time on appeal, he never assented to the arbitration agreement.

““It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal.”” (*Westsidiers Opposed to Overdevelopment v. City of Los Angeles* (2018) 27 Cal.App.5th 1079, 1091; see *Krechuniak v. Noorzoy* (2017) 11 Cal.App.5th 713, 725 [“if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal”].) Although Spaulding suggests this forfeiture rule is limited to appellants, it applies equally to respondents. (See, e.g., *A.M. v. Ventura Unified School*

parties’ agreement.” For the former, the employer had to pay the arbitrator’s compensation, expenses, and costs, unless the arbitrator determined the employee’s claim “was filed for purposes of harassment or is patently frivolous.” For the latter, the employee could be liable for costs and half the expenses.

⁸ The confidentiality provision states: “The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.”

Dist. (2016) 3 Cal.App.5th 1252, 1263-1264; *14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1403, fn. 1.) “‘This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal.’ . . . “Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. . . . Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier.’” (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.) By not raising his new substantive unconscionability arguments in the trial court, Spaulding forfeited them on appeal. (See *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 93 [plaintiffs forfeited unconscionability and severance arguments where they “did not argue that any aspect of the arbitration agreement, aside from the costs provision, was unconscionable”].)

It is true that “[t]he general rule against new issues is subject to an exception that grants appellate courts the discretion to address questions not raised in the trial court when the theory presented for the first time on appeal involves only a legal question determinable from facts that are (1) uncontroverted in the record and (2) could not have been altered by the presentation of additional evidence.” (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1237-1238; see *In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 511.) Still, “[m]erely because an issue is one of law, does not give a party license to raise it for the first time on appeal.” (*Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1275, fn. 3.) “Courts are more inclined to

exercise this discretion and consider such legal issues where the public interest or public policy is involved.” (*POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 750-751; see *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417 [“[t]his forgiving approach has been most frequently invoked when ‘important issues of public policy are at issue’”].)

This is not an appropriate case to exercise discretion to address forfeited arguments. Spaulding’s new arguments raise factual issues this court cannot consider and resolve for the first time on appeal. For example, whether Spaulding indicated his disagreement with the arbitration agreement by signing it with an illegible signature, crossing out the word “voluntarily,” and writing “UD” to signify “under duress” is a question of fact. (See *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269 [“[m]utual assent is a question of fact”]; *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 176 [“[t]he question of duress . . . is a factual question; the existence of duress always depends upon the circumstances”].) Similarly, whether the arbitration agreement was an employer plan agreement or an individually negotiated employment agreement and whether Papa John’s is, and obtains an advantage from being, a repeat player in AAA arbitrations are also factual issues. (See *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 94 [arbitration provision governing selection of arbitrators was not unconscionable where the plaintiff “presented no evidence” that the “arbitration procedures would entail a ‘repeat player effect’”]; Shestowsky, *Misjudging: Implications for Dispute Resolution* (2007) 7 Nev.L.J. 487, 493-494 [“some evidence suggests that even experienced repeat-players do not use outcome information as effectively as one might expect”].)

Nor do Spaulding's arguments implicate important issues of public interest or public policy. With the possible exception of Spaulding's repeat player argument, Spaulding's new arguments involve issues that are personal to Spaulding and his claims.

DISPOSITION

The order denying the motion by PJCA-2 and Ruiz to compel arbitration is reversed. The case is remanded with directions to grant the motion to compel arbitration. PJCA-2, Ruiz, and Papa John's USA, Inc. are to recover costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.